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ORIGINAL
FILE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Continuous Sponsorship Identification for Program-Length Commercials	)	RM-7984

COMMENTS OF
NATIONAL INFOMERCIAL MARKETING ASSOCIATION

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NIMA

SUMMARY

The Commission should reject the petition because there is no basis in fact or law for revising the Sponsorship Identification Rule as it applies to program-length commercials.

The current Rule appropriately implements Section 317 of the Communications Act as applied to infomercials, as the Commission testified before Congress in 1989. The petition is based on the premise that the format of infomercials is inherently deceptive. But there is no evidence to support this view, which contradicts the considered judgment of the Federal Trade Commission. The FTC maintains an effective enforcement program against deception in advertisements, including program-length commercials. The FTC believes that its enforcement program is adequate to prevent consumer deception.

Program-length commercials provide critical revenue to support on-air television. The Commission should not single out this form of advertising for intrusive on-screen disclosure obligations that might adversely affect its viability in the marketplace, and thus jeopardize this income stream. Finally, the petition raises substantial First Amendment concerns, and the discriminatory and onerous restrictions it proposes cannot withstand scrutiny under recent commercial speech decisions.

NIMA

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The National Infomercial Marketing Association (NIMA), by counsel, submits these comments in opposition to the petition of the Center for the Study of Commercialism et al. requesting that the Commission issue a declaratory ruling or amend its Sponsorship Identification Rule insofar as it applies to program-length commercials.

NIMA consists of more than 110 companies that are involved in the program-length commercial industry, including such entities as QVC and the Home Shopping Network. NIMA represents all the major producers of program-length commercials, and its members account for approximately 80% of all infomercials currently being shown. The infomercial format is being used by such recognized mainstream advertisers as General Motors, Volvo, the State of Arizona, Time-Life, Black & Decker, Proctor-Silex and Bissell. The merchandise sold through infomercials includes cars, kitchen products, housewares, cosmetics, and self-improvement products.

NIMA believes that the petition presents no statutory or factual justification for revising the Sponsorship Identification Rule to require continuous sponsorship identification for program-length commercials. The Commission should continue its current policy of conserving its scarce resources and deferring to the Federal Trade Commission for prosecution, on a case-by-case basis, of any infomercials that may mislead consumers.

Program-length commercials serve the public interest by providing valuable information to consumers and by helping to support on-air television. The Commission should be reluctant to act, in the absence of any evidence, to restrict these programs in a manner that might jeopardize this critical information and income stream. Finally, the petition raises significant First Amendment issues, by proposing intrusive and burdensome restrictions on protected commercial speech without any showing of the necessary justification.

I. The Petition Provides No Basis for Revising the Sponsorship Identification Rule.

The Sponsorship Identification Rule imposes an obligation on licensees to make certain that the identity of the sponsor of the program is explicitly identified for viewers. The current Rule fully serves the statutory purpose of requiring accurate disclosure of sponsors of program-length commercials. The petition, however, would

convert the Rule to a different purpose -- to use it as a device for addressing allegedly deceptive acts by producers of programs. However, neither Section 317 nor the Rule is intended to serve as an anti-fraud provision, and the Commission should reject the proposal that it be transformed for this purpose.

In May 1989, the Commission testified before Congress that the existing requirement for identification of sponsored material assured that the public is informed when it is watching paid-for broadcast matter.[1] Nothing in the petition suggests a basis for revising that policy. If problems recur with misleading or deceptive material in individual programs, they can and should continue to be addressed by the Federal Trade Commission under its general consumer protection authority.

A. The Current Rule Appropriately Implements Section 317. Section 317 of the Communications Act, 47 U.S.C. 317, requires that the licensee of a station must insure that any program for which consideration is received "from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished . . . by such person."

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[1]Testimony of William H. Johnson, Deputy Chief, Mass Media Bureau, FCC, in Infomercials, Hearing before the Subcommittee on Exports, Tax Policy and Special Problems of the House Committee on Small Business, 101st Cong., 1st Sess. 36-37, 106 (written testimony)(May 2, 1989).

The Commission's implementing Rule, 47 C.F.R. 73.1212(a), provides that the station shall announce "(i) that such matter is sponsored . . ., and (ii) by whom or on whose behalf such consideration was supplied." As the Commission has stated:

> "The purpose of Section 317 of the Act and Section 73.1212 of the Rules is to require that the audience be clearly informed that it is hearing or viewing matter which has been paid for when such is the case, and that the person paying for the broadcast of the matter be clearly identified." Sponsors, Identification of Advertising, 66 F.C.C.2d 302, 303 (1977).

The Commission's rules do not spell out what constitutes an appropriate announcement. That obligation is left to the judgment of the licensee. See Carter/Mondale Reelection Committee, 88 F.C.C.2d 439, 441-42 (1980); Sponsorship Identification Rules, 40 Fed. Reg. 41936, 41940 (Sept. 9, 1975). The Commission generally has resisted proposals that the Rule specify in detail what identifications would be required for specific programs. At the same time, the Commission has maintained a vigorous enforcement program against licensees who fail to provide adequate identification. See Infomercials, supra, at 36.

The Commission has never applied the Sponsorship Identification Rule to require multiple identifications of a sponsor during a program, let alone continuous identification. In practice, the Commission for many years has applied a policy that a single visual sponsorship identification during a program is sufficient to satisfy the

requirement of Section 317 "that the public is entitled to know by whom it is being persuaded."[2] The only exception to this "single identification" principle is for political advertisements of more than five minutes in length, where the Rule requires one identification at the beginning and one at the end of each commercial, but none in the middle of the program. 47 C.F.R. 76.1212(d).

Under Commission precedent, nothing about the length of infomercials suggests that a different identification obligation is appropriate. Although program-length commercials generally were not permitted before 1984, the Commission has many years experience with questions of sponsorship identification in half-hour shows. For example, where property is furnished by the producer of a program in return for special mention, the Rule long has required the station to make an announcement. See 40 Fed. Reg. 41936, 41938-39. But the FCC has never required that the identity of the sponsor be announced contemporaneously with the plug that creates the obligation to identify. The Rule is satisfied as long as an appropriate announcement is made at the end of the program, even though a substantial period of time may intervene and viewers may have changed channels.

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[2]Sponsorship Identification, KOOL-TV, 26 F.C.C.2d 42 (1970); Sponsorship Identification, 46 RR2d 350, 352 (1979).

For these reasons, inclusion of an appropriate announcement at the conclusion of an infomercial satisfies the requirement of Section 317 that the viewer be informed of the person "by whom it is being persuaded". The petition, however, would expand Section 317 far beyond its intended limited role to address what it regards as the inherent deception in the infomercial format. We discuss below why this claim of deception is without foundation.

For present purposes, the critical point is that the petition seeks to convert a simple identification requirement to serve a broad anti-fraud purpose. But there is no support in Section 317, as previously interpreted by the Commission, for use of this authority in such a fashion. Furthermore, as a general proposition the Commission has explicitly declined to police advertising, but instead has deferred to the greater authority and expertise of the FTC. There is no justification for introducing such a role through a backdoor, by a contrived expansion of the reach of Section 317.

B. <u>There Is No Evidence To Support the Claim that Program-Length Commercials Are Inherently Deceptive</u>. The petition is premised upon the assertion that infomercials are inherently deceptive and are designed to exploit audience unawareness that they are watching advertising (Pet. at 24); and that viewers cannot tell the difference

between news or entertainment programming and program length commercials (Pet. at 5). The petition asserts that viewers are "conditioned" to regard longer programs as entertainment, and "assume" they are not commercials (Pet. at 3, 5). It also argues that the infomercial is uniquely geared to stimulate on-the-spot purchases (Pet. at 4) and that modern channel changing habits defeat the effectiveness of current sponsorship identification notices (Pet. at 4-5).

Petitioners offer no empirical evidence or studies to support these assertions. Instead, they cite press articles reporting on the "controversy" surrounding infomercials, reports that in turn rely on scattered complaints about individual programs. Upon analysis, the allegations in the petition are wholly without foundation.

First, there is no support for the proposition that program-length commercials generally, or those that include direct response segments, are inherently deceptive. To the contrary, the FTC testified before Congress in 1989 and 1990 that, in its expert judgment, the infomercial format is not inherently deceptive.[3]

Second, there is no basis for the assertion that viewers are unable to distinguish between program-length

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[3] Infomercials, supra, at 29 (testimony of William MacLeod, Director, Bureau of Consumer Protection, FTC); Consumer Protection and Infomercial Advertising, Hearing before the House Committee on Small Business, 101st Cong., 2d Sess. 26, 95-96 (1990)(testimony of Barry Cutler, Director, Bureau of Consumer Protection, FTC).

commercials and entertainment programming. As the FTC testified, the commercial intent of many program-length commercials is apparent on their face. See Consumer Protection, supra, at 95-96. The purpose of an infomercial, after all, is to generate sales through direct consumer responses, which requires that the consumer be aware that his or her business is being solicited.

The Commission has never previously recognized claims that adult viewers are unable to distinguish between programming and commercials. It has found that younger children (age 12 and under) may have difficulty distinguishing between program material and advertisements, and in understanding the persuasive intent of commercials.[4] However, there is no support in prior rulemakings for petitioners' claim that mature viewers cannot, as a general matter, identify the commercial nature and intent of program-length advertisements. It is true that individual infomercials may contain express or implied misrepresentations that create actual consumer confusion about their commercial intent. This possibility, however, does not condemn the entire format. Rather, it suggests that this is a law enforcement matter to be addressed by the FTC on a case-by-case basis.

Third, infomercials are hardly unique in seeking to

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[4]See Children's Television Programming, 6 FCC Rcd 5093, 5100 (1991); Children's Television Programming, 6 FCC Rcd 2111, 2114 (1991).

stimulate immediate responses. With the development of 800 number technology, this type of commercial has become familiar, both in traditional commercial length and longer formats. Finally, as discussed above, the possibility of channel changing has been present throughout the administration of the Sponsorship Identification Rule, but the Commission has never found that it requires contemporaneous or continuous disclosure of the identity of the sponsor.

Finally, whatever problems may have existed in this area in the past, the infomercial industry itself has taken self-regulatory action to insure that viewers are informed of the commercial nature of their programs. In 1991, NIMA published its Marketing Guidelines for the infomercial industry, which members of the Association are required to follow as a condition of membership. The Guidelines require that each infomercial clearly identify the sponsor. But the Guidelines go well beyond the Rule to require specific statements that the program is a commercial for the product involved. They require that each program "be preceded and concluded with a clear and prominent written or oral announcement that the program is a paid advertisement" for the product. The Guidelines further require that "a clear and prominent written or oral announcement should also be made prior to each ordering opportunity that the program the viewer is watching is a paid advertisement" for the product.

As Commissioner Owen of the FTC recently noted, many of the principles of the NIMA Guidelines have parallels in FTC law, including requirements pertaining to disclosure of the nature of the program, substantiation of claims, and truthfulness of claims. She concluded that adherence to the Guidelines "can go a long way toward ensuring that infomericals remain within the boundaries of truth and tend to benefit, not deceive, consumers."[5]

C. The FTC Maintains an Effective Enforcement Program. It would be an inefficient use of the Commission's resources to attempt to conduct an enforcement program for producers of program-length commercials under the cover of a revised Sponsorship Identification Rule. The FTC, unlike the FCC, possesses general anti-fraud jurisdiction. It is effectively exercising that authority to detect and punish those few program-length commercials that contain misleading misrepresentations. Rather than competing with the FTC, the Commission should continue its practice of deferring to the expertise of the FTC in policing these advertisements.

The FTC actively reviews program-length commercials to prevent false and unsubstantiated claims. The petition erroneously asserts (Pet. at 14), however, that the FTC scrutiny is limited to infomercials that contain deceptive

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[5] "The Federal Trade Commission Looks at Infomercials", Speech of Commissioner Deborah K. Owen, FTC, delivered June 5, 1992 (copy attached).

product claims. But as the FTC has testified before Congress, it reviews infomercials to make certain that the format does not deceive consumers by asserting, explicitly or implicitly, that a commercial is actually news or entertainment programming.[6] When such abuses have been found, the FTC has exercised its authority to prohibit the continued showing of the program and to impose broad remedial controls. See Consumer Protection, supra, at 86-90.

In recent consent decrees, the FTC has used its "fencing-in" authority to require that infomercials found to be deceptive carry adequate sponsor identification; that they identify the paid nature of the commercial at the beginning and end of the program; and that they similarly disclose the commercial nature of the show at each point before the consumer is directly solicited to call an (800) number or place a mail order. The FTC has never required a continuous disclosure, even when the program involved has been found to be deceptive.[7] The FTC has testified before Congress that, in its judgment, the frequency and types of disclosure required adequately cured the deception it had found. Consumer Protection, supra, at 15, 97.

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[6]Infomercials, supra, at 29-30; Consumer Protection, supra, at 95-96. See Speech of Commissioner Owen at 3.

[7]Speech of Commissioner Owen at 4-5.

II. Revenues Generated by Program-Length Commercials Help Support On-Air Television.

Program-length commercials provide viewers with useful information about a variety of products and services. They compete for an audience with other video programming, and if they failed to provide content of interest to viewers, then marketplace reactions ("dialing away" to preferable programs) would automatically limit the level of their use. See Commercial TV Stations, 98 F.C.C.2d 1076, 1102-03 (1984).

The income stream provided by program-length commercials helps support over-the-air broadcasting. In 1990, program-length commercials generated an estimated $500 million in revenue, more than half of which represented revenues to broadcast stations, especially independent stations. In 1991, these revenues grew to an estimated $750 million, and revenues for 1992 are projected to reach approximately $1 billion. Infomercials therefore significantly assist broadcast television in competing with other forms of video programming, by providing revenues that assist in the development and purchase of new entertainment programs.

The petition essentially requests that the Commission brand program-length commercials with a continuous, on-screen identification obligation that would not be required of any form of television advertising with which these programs compete. There is a substantial risk that singling

out this form of advertisement for such branding would substantially reduce its attractiveness to viewers, and therefore damage its viability in the marketplace. At a minimum, the continuous disclosure requirements would limit the development of advertising programs and restrict the creative freedom of program producers.

Continuation of the income stream provided by program-length commercials serves the public interest by helping to support broadcast stations and making other forms of programming possible. See Children's Television Programming, 6 FCC Rcd 2111, 2117 (1991). The Commission should not jeopardize this revenue stream based on the unsupported allegations of stereotypical viewer behavior contained in the petition.

III. The Petition Raises Significant First Amendment Concerns.

In requesting that program-length commercials be branded with a visible, continuous identification requirement required of no other form of advertising carried on television, the petition raises substantial First Amendment concerns.

Television advertising is a form of commercial speech protected by the First Amendment. See, e.g., FCC v. League of Women Voters, 468 U.S. 364, 380 (1984); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In reauthorizing the Federal

Trade Commission in 1980, Congress itself recognized that First Amendment concerns suffused television advertisements that are truthful and nondeceptive and protect them against intrusive regulation of their contents. See 3 U.S. Code Cong. & Admin. News 1102, 1119 (1980).

Commercial speech may be restricted by the government only if its interest in doing so is substantial; the restrictions directly advance the government's asserted interest; and the restrictions are no more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). The government bears the burden of justifying any restriction on speech, and must demonstrate by real evidence that its interest is substantial. See Fox v. Board of Trustees, 841 F.2d 1207, 1213 (2d Cir. 1988), aff'd, 492 U.S. 469 (1989).

Moreover, while the means chosen need not necessarily be the least restrictive one available, it must be "narrowly tailored to achieve the desired objective . . . ." Fox v. Board of Trustees, 492 U.S. at 480. Again, the government bears the burden affirmatively to establish the narrow fit. Id. This burden of proof is necessary to protect advertisers and consumers from unjustified or unduly burdensome regulation that might have a chilling effect on protected commercial speech. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1984).

Given the First Amendment context, the Commission has properly adopted a restrained approach in regulating program-length commercials because of First Amendment concerns. See Children's TV Programming, 6 FCC Rcd 2111, 2118 (1991). Under the circumstances, due consideration for First Amendment concerns requires that the petition be rejected.

First, as noted above, there is no evidence of record that could be used to justify an across-the-board restriction on infomercials. Without such evidence, it is impossible to perform the test required by Central Hudson to determine whether the restriction on commercial speech that would result from the continuous identification requirement could be justified.

Second, a continuous sponsorship identification requirement would intrude significantly into the artistic freedom and flexibility of advertisers in designing infomercials. These restrictions would have an adverse impact on the effectiveness of the resulting commercial speech, and impose substantial costs on advertisers. See Fox, supra, 490 U.S. at 480 (requiring that the costs of restrictions be carefully calculated, so as not to be inordinate and to be outweighed by a substantial governmental interest).

Third, petitioners cannot carry the burden of showing that their proposal is narrowly tailored to address the

alleged harm involved. The commercial intent of many infomercials is absolute on their face. In other infomercials, there is no evidence that viewers are unable to differentiate between advertising and non-commercial content, so there is no justification for imposition of any further identification requirement.

Further, even in cases where infomercials have been adjudged to misrepresent commercial material as news or entertainment, the FTC has found that far less intrusive remedies are sufficient to cure the problem -- that is, identifications at the beginning and end of the program, and further notices before each ordering opportunity. This restrictive approach by the FTC comports with the Supreme Court's holding in In re R.M.J., 455 U.S. 191, 203 (1982), that restrictions placed on deceptive advertising "may be no broader than reasonably necessary to prevent the deception." A fortiori, this decision substantially limits the Commission's ability to place intrusive restrictions on non-deceptive speech.

For these reasons, the proposed continuous identification requirement cannot be justified under the test established by Fox and Central Hudson that a restriction be no more extensive than necessary to serve the government interest involved. Accordingly, First Amendment considerations strongly suggest that the Commission should deny the petition.

NIMA

CONCLUSION

For these reasons, NIMA respectfully submits that the Commission should reject the petition and should not issue a declaratory ruling or initiate a rulemaking to consider a continuous sponsorship identification requirement for program-length commercials.

Respectfully submitted,

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June 10, 1992

Federal Trade Commission

The Federal Trade Commission
Looks at Infomercials

Prepared Remarks of

The Honorable Deborah K. Owen
Commissioner
Federal Trade Commission

Before the

National Infomercial Marketing Association

First Annual Mid-Year Seminar

Grand Hyatt Washington
Washington, D.C.

June 5, 1992

The views expressed are those of the Commissioner, and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

It is a pleasure to be here this morning to lead off your discussions about the opportunities and the challenges ahead for the infomercial industry. When I began my tenure at the Federal Trade Commission in 1989, infomercials were a relatively new phenomenon and still somewhat limited. Today, as a result of rapid growth in recent years, they have become widely used and accepted as a medium that is adaptable for many purposes. I would like to give you an overview of the Commission's activities in this area, and discuss some of the issues that you may wish to consider as the industry continues to mature. Later in my presentation, you will hear me talk about the importance of disclosures and, in that spirit, I first have one of my own: please keep in mind that my remarks today are solely my own and do not necessarily represent the views of the Commission or of any other Commissioner.

I have to give credit to whoever came up with the name, "infomercial," because it succinctly and clearly captures the concept of a commercial that provides information. Although all advertisements can be informational, the unique construct of the infomercial provides greater opportunities for businesses to explain their products, and for consumers to learn about them in a convenient manner. Because the length of the program allows the communication of more comprehensive information, the infomercial can play a beneficial and productive role in the marketplace. Through an infomercial, consumers can see a full demonstration of the product, hear from experts in the relevant

field, learn about a product's attributes and limitations, and more.

At the Federal Trade Commission, infomercials are analyzed using the same principles that we use to analyze any other advertisement. After all, the infomercial is simply one category within the broad genre of commercial speech. Thus, as with all other advertising, the Commission seeks to enforce the law in a manner that prohibits deceptive claims, without unnecessarily restricting your freedom to advertise truthfully.

Before getting into the particulars of infomercials, let me give you a brief refresher of how we enforce the FTC Act's prohibition against unfair and deceptive advertising. Most of our advertising cases involve considering whether the messages conveyed are false or otherwise deceptive. After first determining what messages are conveyed by the ad, the Commission looks to the evidence to support those claims. Under the Commission's substantiation policy, every objective product claim, whether it is express or implied, must be founded on a reasonable basis. The amount of evidence required to provide a reasonable basis depends on a number of factors, including the type of claim, the type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation, and the amount of evidence experts in the field believe is reasonable. The type of evidence required depends on

the nature of evidence implied by the ad itself, and in some cases, this may be scientific evidence.

Whether an ad is deceptive is determined by considering whether a claim is likely to materially mislead consumers acting reasonably under the circumstances. In this context, it is important to remember that an ad that is literally true on its face, might nevertheless be deceptive if material information is omitted.

The concept of deception is the underlying theory for the Commission's challenge of certain infomercial formats. The question of whether the format of an advertisement is, in and of itself, deceptive is an issue that in the recent past has arisen most often in the infomercial context. But, even this issue is not unique to infomercials. As early as 1967, the Commission issued a policy statement regarding the use of formats for print advertisements that closely resemble news or feature articles. The Commission opined that ads of this nature should clearly and conspicuously include the word "ADVERTISEMENT." The Commission's concern in this area is that consumers not be misled into believing that the column they are reading, or the program they are viewing, is independent, objective, or unbiased. Consumers should be able to discern, either by the format, or through appropriate disclosures if necessary, that a communication is commercial in nature, so that their evaluation of the information

can be processed accordingly. Based on this reasoning, the Commission has challenged infomercials that appeared to be objective feature programs or investigative news shows, and which did not otherwise disclose their true nature as commercials.

Although, under our general advertising standards, a disclosure will not necessarily negate an affirmative misrepresentation, disclosures can be sufficient in many cases to avoid deceptive implications. Adequate disclosures may help ensure that the format of your infomercial is not misleading. If your infomercial is in a format that does not readily appear to be a commercial, for example, if it resembles a talk show, or a news or feature program, you may need to make an explicit disclosure during the program to inform consumers that they are viewing an advertisement. In each of the consent orders the Commission has entered into with parties whom we have charged with deceptive formats, the Commission has required specific disclosures. Most of our orders have required that a disclosure be made at the beginning of the program, and again each time ordering information is provided during the program.

I am aware that a petition currently pending at the Federal Communications Commission requests that infomercials be required to carry a continuous disclosure of their commercial nature. While the Commission has not taken a specific position as to the need for such an approach, the Commission has never required a